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STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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Attorney General

DIVISION OF PUBLIC ADVOCACY
ENVIRONMENTAL PROTECTION BUREAU

August 19, 2004

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Commandant, United States Coast Guard
c/o Executive Secretary
Marine Safety and Security Council (G-LRA)
United States Coast Guard Headquarters
2100 Second Street, SW
Washington, D.C. 20593-0001

Docket Management Facility
U.S. Department of Transportation, room PL-401
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Request for correction, Final Rule on Mandatory Ballast Water Management
Docket USCG-2003-14273 - 50

It appears that the Coast Guard has made several errors in its recent rulemaking, "Mandatory Ballast Water Management Program for U.S. Waters," published July 28, 2004 in the *Federal Register* (69 FR 44952-61). The Office of the Attorney General of New York hereby requests that these errors be corrected.

In addition, pursuant to 5 U.S.C §553(e), please include this request as part of the Petition for Rulemaking submitted to the Coast Guard on July 15, 2004, by New York, other Great Lakes states, and Great Lakes United.

The Coast Guard asserts (69 FR 44952, top of column 3) that "The Great Lakes ballast water management program remains unchanged" as a result of this rulemaking. We do not understand how this can be correct. The rulemaking apparently has removed an ambiguity in the Great Lakes ballast water management program by requiring that "all vessels, U.S. and foreign, equipped with ballast tanks, that enter the waters of the United States after operating beyond the Exclusive Economic Zone [EEZ]"¹ must now, if they carry ballast water taken on less than 200 nautical miles from any shore, employ at least one ballast water management practice.² In so

¹Existing 33 CFR 151.2005(b), applicable *inter alia* to vessels that enter the Great Lakes.

²New 33 CFR 151.2035(b), as given in 69 FR 44961 (July 28, 2004).

doing, the rulemaking has created a requirement that applies to essentially all vessels entering the Great Lakes from outside the EEZ, regardless of whether those vessels are fully ballasted or claim “No Ballast on Board.” The rulemaking therefore appears to make a clear and substantive change in the regulation of vessels entering the Great Lakes from outside the EEZ, particularly vessels that claim “NOBOB” (“No Ballast on Board”) status. Simply put, there is no longer any discernible exemption for NOBOB vessels under this rulemaking. Assuming this is true, the elimination of the NOBOB exemption constitutes a very significant change for the Great Lakes.

This matter of NOBOB vessels (NOBOBs) and the Great Lakes ballast water management program is closely related to issues that we raised in our recent petition to the Coast Guard (July 15, 2004). Our petition deals with subpart C of 33 CFR 151, while our comments in this letter relate to changes made to subpart D by the July 28th rulemaking. In subpart C, the Coast Guard has long relied on inappropriate wording that is contrary to statute (“each vessel that carries ballast water”) to justify a NOBOB exemption. By means of this wording, the Coast Guard apparently makes a false distinction between vessels carrying ballast water and vessels carrying none. In fact, there can be no real distinction of this type, as there is no truth to the idea that NOBOB vessels “are not carrying ballast water” (they often carry up to 100 tons or more³). Recently, in another rulemaking, the Coast Guard made a very selective change in the wording of subpart C (such that the inappropriate phrase, “each vessel that carries ballast water,” remains applicable to most sections but was replaced in one section by the phrase “all vessels...equipped with ballast tanks”).⁴ The false distinction in subpart C was thus either maintained or eliminated on a section-by-section basis by this recent rulemaking. In the same rulemaking, the Coast Guard also referred to “vessels that have tanks or voids, but are not carrying ballast water,”⁵ thereby emphasizing the false distinction that our petition challenges and that the NOBOB exemption has relied on. The surprising part of the new July 28th rulemaking and its revision of Subpart D is that it does *not* rely on the inappropriate wording or distinction found in subpart C, yet it appears to perpetuate the NOBOB exemption without any discernible basis for doing so. At the very least, a clear explanation is needed. This should be provided in a correction to the rulemaking.

The Coast Guard also claims (69 FR 44955, column 3) that “our final rule for mandatory BWM does not address NOBOBs.” However, there is no discernible language in the rule that excludes NOBOB vessels from mandatory BWM. Indeed, the Coast Guard’s own discussion in the rulemaking helps prove the point that there is no discernible exclusion. In responding to a commenter who suggested “that a minimum ballast water transfer quantity or capacity should be established and that BWM or reporting should not be required for volumes below these amounts,” the Coast Guard disagreed and stated that “we are required to analyze BWM operations for vessels, regardless of a vessel’s capacity or volume of ballast water carried on any particular voyage. Therefore, we are not establishing a minimum quantity or capacity

³See our petition to the Coast Guard dated July 15, 2004.

⁴69 FR 32864-71 (June 14, 2004), as corrected in 69 FR 40767-68 (July 7, 2004).

⁵69 FR 32866 (June 14, 2004), bottom of column 3.

requirement.”⁶ This question of a minimum quantity requirement is at the heart of the NOBOB issue. As we have noted, NOBOBs routinely carry residual ballast water, ranging up to 100 tons or more. There appears to be no disagreement as to this fact. If a NOBOB exemption exists, it cannot be based on a minimum quantity criterion, especially now that the Coast Guard has clearly ruled this out. Moreover, if a NOBOB exemption exists, it cannot be routinely based on concerns about vessel safety. We recognize that it would be unwise and potentially unsafe to require a fully loaded ship to fill its ballast tanks to the top for the purpose of exchange (this could destabilize a vessel, as the Coast Guard has pointed out⁷). We have emphasized alternatives, such as partial filling, then flushing, of NOBOB tanks, or the continual flushing of such tanks with a small volume of water, as ways of carrying out exchange safely.⁸ The exchange of small and/or residual quantities of ballast water (a practice sometimes called “swish and spit”⁹) has apparently been conducted on at least a few occasions by ships entering the Great Lakes, as illustrated by the following examples taken from our review of Coast Guard ballast water records for the year 2000:

- a) In October 2000, the *Piyi D* apparently conducted 100% exchange of each of several tanks totaling 68 m³. As indicated on its ballast water reporting form which is attached to this letter, the ship used a method that it described as “Ballasting/Deballasting conducted.”
- b) In April 2000, the *Rubin Hawk* apparently exchanged each of 9 tanks totaling 14.89 m³. As indicated on its ballast water reporting form which is attached to this letter, the ship used a method that it described as “Filled up the empty ballast tanks for about 20% then pump out & stripped.”
- c) In September 2000, the *Yria* apparently exchanged each of several tanks totaling 103.7 m³, called “none only remains,” by an empty/refill process. As indicated on its ballast water reporting form which is attached to this letter, the ship used a method that it described both as “ER twice washed” and as “One by one twice partly ballast-deballasted.”

Based on the above discussion and examples, it is evident that *mandatory BWM is required for NOBOBs* under any reasonable interpretation of 33 CFR 151 subpart D, as amended by this rulemaking, and that *ballast water exchange by NOBOB vessels is neither routinely unsafe nor routinely impossible*.

⁶69 FR 44955 (July 28, 2004), column 1.

⁷64 FR 26675 (May 17, 1999).

⁸For example, see p. 5 of our Petition to the Coast Guard dated July 15, 2004; also p. 6 of our comments to the Coast Guard on this rulemaking, dated October 28, 2003 and filed in the rulemaking docket as USCG-2003-14273-42.

⁹E. Reeves, *Toledo J. Great Lakes' Law, Science & Policy* 2, 125, 145 (2000).

There are other inaccuracies in the rulemaking as well. The rule's preamble improperly describes an empty/refill exchange as follows (69 FR 44954, top of column 1): "The tank (or pair of tanks) is *pumped down to the point where the pumps lose suction*, and then the tank is pumped back up to the original level." (Emphasis added.) This is an inappropriate and incorrect paraphrase of the true definition, which is part of the regulation and remains unchanged by this rulemaking:

Empty/refill exchange means to pump out the ballast water taken on in ports, estuarine, or territorial waters *until the tank is empty*, then refilling it with mid-ocean water; masters/operators should pump out *as close to 100 percent of the ballast water as is safe to do so*.

(33 CFR 151.2025(b); emphasis added.)

Similarly, the Coast Guard claims (69 FR 44955, top of column 1) that "A 'full exchange' using the 'empty/refill' method means that the ballast tanks are *pumped down to the point where the pumps lose suction*, and the tank is then refilled to the original level." (Emphasis added.) Again, this misstates the definition given in the regulations.

Finally, the Coast Guard claims (69 FR 44954, columns 2-3) that "National ballast water discharge data is publicly available and can be found at the Web site for the National Ballast Information Clearinghouse at <http://invasions.si.edu/NBIC/ballast.html>." This statement is misleading, in that Great Lakes ballast water data is *not* available at that web site or any other web site.

We believe that, in light of these inaccuracies and inconsistent statements, the Coast Guard must correct the record and clarify that NOBOBs are no longer exempt from mandatory ballast water management, that the regulatory definition of empty/refill applies, and that Great Lakes ballast water data is not available in the manner stated in the rulemaking and, in general, is less readily accessible than ballast water data from the rest of the country.

In addition to these errors in need of correction, we believe the Coast Guard failed to address our comments dated October 28, 2003, which are on file in the rulemaking docket as USCG-2003-14273-42. In those comments, we made several points that are highly relevant to which the Coast Guard did not respond:

- On p. 3, we commented that "The existing rules have proven completely inadequate to prevent, or even slow, the further introduction of NIS into the Great Lakes. Thus, they should not be considered an adequate basis for regulations to prevent the introduction of NIS into other waters and, in addition, the Coast Guard should work promptly to fix the holes in the current rule." This statement is based on generally accepted scientific studies that have shown an apparent increase, but no decrease, in the rate of new species introductions into the Great Lakes since mandatory BWM requirements were implemented. The purpose of the present rulemaking is not just to take action for the sake of taking action; it is to take action that is effective. *Mandatory BWM in the Great*

Lakes has not been effective, yet the Coast Guard now intends to apply essentially the same BWM requirements to all U.S. waters. The Coast Guard needs to address this issue.

- On p. 5, we commented that “the NOBOB exemption appears to be contrary to the statute and the regulations and to have no basis in law. It should therefore be discontinued.” The Coast Guard’s statement that “While our final rule for mandatory BWM does not address NOBOBs, we believe that addressing these vessels is an important factor in the prevention of NIS introductions” (69 FR 44955, column 3) essentially dismisses the question that we raised in our comment. It neither acknowledges nor responds to our comment.
- On p. 7, we stated that “the fact that several tons of residual ballast water remain in NOBOB ballast tanks is not a result of safety concerns; it is a result of the design of a ship’s tanks and pump inlets. It must be clarified that such design deficiencies cannot be an excuse for operators of NOBOB vessels to invoke ‘safety’ as a reason for failing to comply with the plain language of 33 CFR 151.2035(b)(1). The Coast Guard should clarify that the ‘safety concerns’ noted in Section 151.2030 are reserved for extraordinary conditions and cannot be routinely invoked by NOBOB vessels as a means of avoiding compliance with the ‘complete ballast water exchange’ requirement of Section 151.2035(b)(1).” In its rulemaking, the Coast Guard has neither acknowledged nor responded to this comment.

As noted, we request correction of the rulemaking with respect to each of the several points listed above. In addition, pursuant to 5 U.S.C §553(e), please include this request as part of the Petition for Rulemaking submitted to the Coast Guard on July 15, 2004, by New York, other Great Lakes states, and Great Lakes United.

Respectfully submitted,



Raymond Vaughan
Environmental Scientist



Timothy Hoffman
Assistant Attorney General

BALLAST WATER REPORTING FORM

(To be provided to the Port State Authority upon request)

INFORMATION

IMO Number: 01596 M
 Type: Bulk Carrier
 Gross Tonnage: 18047
 Call Sign: 9HSF6
 Arrival Date: 13/11/2000
 Agent: LADEN MARITIME INC
 Port of Origin: Montreal
 Port of Destination: Montreal
 Port of Call: Montreal
 Total Ballast Water Capacity: 11153.1

Management Plan Implemented? YES NO
 Management Plan Implemented? YES NO
 IF NONE IN BALLAST GO TO No 5.

LAST WATER HISTORY: RECORD ALL TANKS THAT WILL BE DEBALLASTED IN PORT STATE OF ARRIVAL: IF NONE GO TO No. 5.

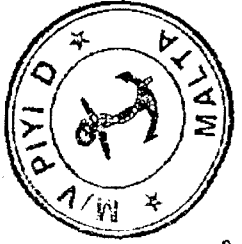
BALLAST WATER SOURCE				BALLAST WATER EXCHANGE				BALLAST WATER DISCHARGE			
DATE	Port of Origin	Volume (units)	Temp (units)	Circle one: Empty/Refill or Flow Through	% Exch	Sea Hgt (m)	DATE	Port of Discharge	Volume (units)	Salinity (units)	
14/10/00	33°45'N	16424W	17.5	100%	2.00 m						
14/10/00	33°45'N	161°29'W	1.0	100%							
15/10/00	33°35'N	158°18'W	25.9	100%							
15/10/00	33°35'N	158°18'W	25.9	100%							
15/10/00	33°35'N	158°18'W	25.9	100%							
15/10/00	33°35'N	158°18'W	25.9	100%							

Water Tank Codes: Forepeak = FP, Aftpeak = AP, Double Bottom = DB, Wing = WT, Topside = TS, Cargo Hold = CH, Other = O
 CHANGES WERE NOT CONDUCTED. STATE OTHER CONTROL ACTION(S) TAKEN: Ballasting in Port State of Arrival conducted

STATE REASON WHY NOT: YES NO

INSIDE OFFICER'S NAME AND TITLE (PRINTED) AND SIGNATURE: CH. Officer, LADEN MARITIME INC

Prepared by: GKG
 Authorised by: Operations Manager
 Status: 01/00



BALLAST WATER REPORTING FORM

IS THIS VAMENDED BALLAST REP TNG FORM? ☐ YES ☒ NO

1. VESSEL INFORMATION

Vessel Name: **WV RUBIN HAWK**
 IMO Number: **11176**
 Owner: **GRACE HAWK SHIPPING SA**
 Type: **BULK CARRIER**
 GT: **11176**
 Call Sign: **3FXFY**
 Flag: **PANAMA**

2. VOYAGE INFORMATION

Arrival Port: **MONTREAL CANADA**
 Arrival Date: **12th APRIL 2000**
 Agent: **COLLEY MOTORSHP LTD. MONTREAL**
 Last Port: **IMMINGHAM, ENGLAND**
 Next Port: **HAMILTON, CANADA**

3. BALLAST WATER USAGE AND CAPACITY

Specify Units Below (m³, MT, LT, ST)
 Total Ballast Water on Board:
 Volume: **14.89** m³ No. of Tanks in Ballast: **9**
 Total Ballast Water Capacity:
 Volume: **m³** Total No. of Tanks on Ship: **m³**

4. BALLAST WATER MANAGEMENT

Total No. Ballast Water Tanks to be discharged: **NIL**

Of tanks to be discharged, how many: **Underwent Exchange:**

Underwent Alternative Management:

Please specify alternative method(s) used, if any: **FILLED UP THE EMPTY BALLAST TANKS FOR ABOUT 20% THEN PUMPOUT & STRIPPED**

If no ballast treatment conducted, state reason why not: **POST MAIL**

Ballast management plan on board? YES ☒ NO ☐ Management plan implemented? YES ☒ NO ☐

MO ballast water guidelines on board (res. A.868(20))? YES ☒ NO ☐

1. BALLAST WATER HISTORY: Record all tanks to be deballasted in port state of arrival; IF NONE, GO TO #6 (Use additional sheets as needed)

Tanks/ Holds (List multiple sources/tanks separately)	BW SOURCES				BW MANAGEMENT PRACTICES				BW DISCHARGES			
	DATE DDMMYY	PORT or LAT. LONG.	VOLUME (units)	TEMP (units)	ENDPOINT LAT. LONG.	% Exch	METHOD (REFR/ALT)	SEA HT. (m)	DATE DDMMYY	PORT or LAT. LONG.	VOLUME (units)	SALINITY (units)
1.4 WBS(P)	1720 Z 03-04-2000	46-01.0 N 017-46.7 W	m ³	14° C	45-57.5 N 017-55.0 W		ER	3292	1750 Z 03-04-2000	45-57.5 N 017-55.0 W	93.2 m ³	1.026 SG
1.4 WBS(S)	1720 Z 03-04-2000	46-01.0 N 017-46.7 W	m ³	14° C	45-57.5 N 017-55.0 W		ER	3292	1750 Z 03-04-2000	45-57.5 N 017-55.0 W	93.2 m ³	1.026 SG
			m ³	C			ER				m ³	SG
			m ³	C			ER				m ³	SG
			m ³	C			ER				m ³	SG
			m ³	C			ER				m ³	SG

Ballast Water Tank Codes: Forepeak = FP, Aftpeak = AP, Double Bottom = DB, Wing = WT, Topside = TS, Cargo Hold = CH, Other = O

RESPONSIBLE OFFICER'S NAME AND TITLE, PRINTED AND SIGNATURE: **ELMER C. DE LOS SANTOS / CHIEF OFFICER**

BALLAST WATER REPORTING FORM

IS THIS AN AMENDED BALLAST REPORTING FORM? YES ☒ NO ☐

1. VESSEL INFORMATION

Vessel Name: YRIA
 IMO Number: 7641061
 Owner: MONTENDU SAMPANAH
 Type: BULK CARRIER
 GT: 15639
 Call Sign: JBUR2
 Flag: SAINT VICENT

2. VOYAGE INFORMATION

Arrival Port: HAMILTON
 Arrival Date: 7/9/2000
 Agent: GRESKO - MONTREAL
 Last Port: Country of Last Port: JAPAN
 Next Port: Country of Next Port: CANADA
 Port: THUNDER BAY

3. BALLAST WATER USAGE AND CAPACITY

Specify Units Below (m³, MT, LT, ST)
 Total Ballast Water on Board:
 Volume Units No. of Tanks in Ballast
103.7 M3 NONE ONLY REMAINS
 Total Ballast Water Capacity:
 Volume Units Total No. of Tanks on Ship
13606.7 M3 20

4. BALLAST WATER MANAGEMENT

Total No. Ballast Water Tanks to be discharged: NILOf tanks to be discharged, how many: Underwent Exchange: NILUnderwent Alternative Management: NILPlease specify alternative method(s) used, if any: ONE BY ONE TWICE DAILY BALLAST - DEBALLASTEDIf no ballast treatment conducted, state reason why not: NOT AVAILABLE TREATMENTBallast management plan on board? YES ☒ NO ☐ Management plan implemented? YES ☒ NO ☐IMO ballast water guidelines on board [res. A.868(20)]? YES ☒ NO ☐

5. BALLAST WATER HISTORY: Record all tanks to be deballasted in port state of arrival; IF NONE, GO TO #6 (Use additional sheets as needed)

Tanks/ Holds or multiple subdivisions separately	BW SOURCES				BW MANAGEMENT PRACTICES						BW DISCHARGES			
	DATE DISCHARGE	PORT or LAT. LONG.	VOLUME (units)	TEMP (units)	DATE DISCHARGE	ENDPOINT LAT. LONG.	VOLUME (units)	% Each	METHOD (EFFICI/ ACT)	SEA HT. (m)	DATE DISCHARGE	PORT or LAT. LONG.	VOLUME (units)	SALINITY (ppt)
FP					01/03/00	30°30'N 070°24'W	30	5.3						
DB P/S							40	12.2						
DB P/S							40	5.7						
DB P/S							40	5.6						
DB P/S							30	9.6						
AP							30	13						

Ballast Water Tank Codes: Forepeak = FP, Aftpeak = AP, Double Bottom = DB, Wing = WT, Topside = TS, Cargo Hold = CH, Other = O

6. RESPONSIBLE OFFICER'S NAME AND TITLE, PRINTED AND SIGNATURE:

SPILIOPOULOS KONSTANTINOS

CHIEF OFFICER

